Court of Appeal
(Inferior Jurisdiction)

Judge Anthony Ellul

Appeal number: 67/2018/1

Le Jean Coetzee (respondent)

Vs

Culross Global Investment Management Ltd (appellant)

30th July, 2019.

1. On the 5th June, 2018 defendant company appealed the decision delivered by the Industrial Tribunal on the 25th March, 2018. The defendant complained that:-

    i. The Tribunal was hostile to the lawyer assisting the defendant company which might be for reasons of a political nature.
    ii. The Tribunal failed to consider the merits of the case.
    iii. The decision is *ultra petita* and *extra petita*. Although the Tribunal was requested to declare that the dismissal was not for a good and sufficient cause at law and to order payment of half the wage (article 34 of Chapter 452), the Tribunal decided that the employment was to be considered as though it was never interrupted and therefore the appellant was to be paid all that he had the right to from the moment he was dismissed, and this without defining any period for this payment. The Tribunal also ordered the payment of social security contributions and all other payments due to the State with respect to his employment. The plaintiff made no such request in the application filed on the 14th April, 2016. The same applies to the order by the Tribunal addressed to the employer to issue a *'Certificate of Termination of Employment'*. The respondent made no such request.

2. The respondent replied and gave his reasons why the appeal should be dismissed.

3. In brief the facts of the case are:-

   i. The plaintiff was a full-time employee of the defendant company. He was employed as Head of Operations. His duties are not known since Document 'A' referred to in the contract of employment, was not exhibited.

   ii. With effect from the 3rd November, 2015 his employment was renewed for a year (fol. 4).

   iii. Clause 15 of the employment contract provides for a disciplinary procedure; *"The Company Compliance Manuals provide details of the standards which apply to your employment. You should familiarise yourself with these documents to ensure that you have a complete understanding of it prior to accepting the contract. Non-compliance with any company Codes of Conduct will result in disciplinary action".* The Compliance Manuals were not exhibited and it is not clear whether they exist.

   iv. By letter dated 28th January, 2016 (fol. 50) the defendant terminated the employment of the plaintiff after informing him that towards the end of December 2015 and beginning of January 2016 he was guilty of *'gross misconduct and gross negligence'*.

   v. The evidence shows that the plaintiff had processed two payments for a total of $520,000 after he received emails from a person he thought was Nigel Blanshard, Director Chief Investment Officer of the company. However, the emails were a scam. All emails were sent from a private address, personal@privatemaiil.com and not from Blanshard's company email address (nigel@culrossglobal.com).

   vi. Payments refer to two invoices dated 22nd December 2015 and 5th January 2016 (fol. 48-49). Both invoices are false.

vii. The day after the money was transferred to the bank account quoted in the invoices.

viii. Another invoice was received by the plaintiff. This invoice was not paid as plaintiff spoke to Nigel Blanshard who told him that he had never given him any instructions to pay invoices. The plaintiff was in time to stop the third payment from going through.

ix. The person who committed the fraud was not apprehended and the money was not retrieved.

4. In the judgment delivered on the 25th May 2018 the Industrial Tribunal said:

> *"a) Illi t-tkeċċija tal-Appellant mis-Soċjeta Appellata ma saritx skont il-prattika serja bejn ħaddiem u min iħaddem;*
> *b) Ma ġewx osservati kif inhu tabilħaqq xieraq il-proċeduri ta' 'Grievance Procedure' u 'Disciplinary Procedures' biex is-Soċjeta Appellata waslet għad-deċiżjoni serja u finali tat-tkeċċija;*
> *c) Is-Soċjeta Appellata ħasbet biss fl-interessi tagħha biex issalva wiċċha mal-Aworitajiet Finanzjarji tal-pajjiż u injorat id-dmirijiet tagħha li kellha timxi mal-proċeduri kollha, korretti u stabbiliti kif ukoll id-drittijiet tal-Appellant, qabel ma tterminat ir-relazzjoni tax-xogħol mal-Appellant li ġie mkeċċi"*.

5. Contrary to what the plaintiff claims, the Industrial Tribunal's judgment does not deal with the reason which lead the employer to terminate the employee's contract of employment. The Tribunal dealt with the procedural issue concerning the dismissal of the employee, i.e. whether or not disciplinary proceedings were held prior to the dismissal.

6. Article 36(11) of the Employment and Industrial Relations Act (Chapter 452) provides:

> *"An employer who dismisses an employee before the expiration of the time definitely specified by a contract of service,* ***shall pay to the employee one-half of the full wages that would have accrued to the employee in respect of the remainder of the time specifically agreed upon****"*.

7. Article 36(14) provides:-

> *"Notwithstanding the foregoing provisions of this article, an employer may dismiss the employee and the employee may abandon the service of the employer, without giving notice and without any liability to make payment as*

provided in sub-articles (10), (11) and (12) ***if there is good and sufficient cause for such dismissal or abandonment of service****"*.

8. Therefore the employer has no obligation to pay one half of the full wages if he proves there was a *"good and sufficient cause for such dismissal"*. Those words have nothing to do with the disciplinary procedure. The term good and sufficient cause for such dismissal, refers to the reason why the employer terminated the employee's employment.

9. Dismissal should be based on sufficiently serious reasons, for example dishonesty, negligence, and incompetence. There is no provision in our law that the employer cannot prove a good and sufficient cause for dismissal unless the Tribunal is satisfied that adequate disciplinary proceedings have been held by the employer prior to dismissal.

10. The employer alleges gross misconduct because the employee issued two payments for a total of $520,000 without ascertaining the authenticity of the emails requesting such payments and the invoices attached to the emails. Money that the employer did not manage to recoup and therefore incurred a considerable financial loss.

11. The employer claims that:

    i. The instructions were given by emails sent from a private address (personal@privatemaiil.com), which was not Blanshard's private email address. Furthermore, Blanshard had his own work email address which was used to communicate with employees;
    ii. The contents of the invoices is proof that the instructions were a scam;
    iii. The applicant held a high position within the company and should have concluded that things were not right;
    iv. The applicant admitted that he was at fault when on the 13th January 2016 he sent an sms to one of the director's which read:

"Morning tom. Tell me are you coming in today ? do you think you can ? You must of heard, but i made a fuck up of epic proportions" (fol. 80). The defendant company claims that this message is an admission by the plaintiff that he was negligent when he processed the request for payment;

v. Prior to effecting payment, the applicant had doubts on the authenticity of the emails received. He asked for advise to a friend of his, who replied that the email and invoice did not look right. Emails that had been deleted from the company's system. The defendant company claims that this fact in itself shows that plaintiff was acting in bad faith;

vi. The negative impact that this incident had on the financial position of the company.

12. The court believes that the Tribunal, in deciding on whether or not to decide whether the employer's decision was justified, had to consider all evidence and determine whether the applicant was responsible for gross misconduct, when he processed the two payments totalling $520,000. It is only after such an exercise that the Tribunal can establish whether the employer's defence is justified. There is no doubt that in the case of gross misconduct the employer would certainly have lost all trust in his employee and would not want to continue the employment relationship with the employee, especially if one considers the substantial financial loss incurred by the defendant company.

13. This is the whole crux of the case, irrespective of whether or not disciplinary procedures were held. The employer carried out an investigation on what happened, and reached his own conclusions. The Tribunal has to decide whether based on the evidence, the employer was justified in prematurely terminating the contract of employment. The case deals with an allegation of gross misconduct, which if proved certainly justifies dismissal.

14. In his reply the applicant argued that:

> *"... even though the Tribunal established that there was no procedural fairness, this was not the only point on which the Tribunal based its decision, as clearly shown in the decision itself. Therefore, in this case, the Tribunal did not fail in considering the facts of the case"*.

15. The court does not agree. The Tribunal's decision has absolutely no reasoning on the merits of the case, and this is evident when one reads those parts of the decision entitled *'Konsiderazzjonijet'* and *'Punti saljenti kunsidrati'*. In the application whereby plaintiff instituted proceedings in front of the Industrial Tribunal (filed on the 14th April, 2016) he explained his complaint as follows:

> *"5. Illi permezz ta' ittra datata 28 ta' Jannar 2016, kopja ta' liema qed tiġi hawn annessa u mmarkata 'Dok. LJC7' l-esponenti, mingħajr ebda pre-avviż, ġie informat li l-impieg tiegħu kien qiegħed jiġi terminat b'mod immedjat a bażi ta' 'gross misconduct and gross negligence' fejn saret ukoll riferenza għall-klawżola erbatax (14) tal-kuntratt t'impieg preċitat, u dan minħabba dak li kien seħħ f'Diċembru 2015 u Jannar 2016 hekk kif deskritt fil-premess;*
>
> ***6. L-esponenti jikkontesta bil-qawwa kollha r-raġuni mogħtija mill-kumpannija intimata għat-terminazzjoni tal-impieg qabel iż-żmien speċifikat fil-kuntratt u jisħaq li l-istess raġuni hi inveritiera;***
>
> *7.* ***Illi għaldaqstant il-kumpannija intimata ma kellhiex raġuni tajba u biżżejjed biex tittermina l-impieg tal-esponenti qabel iż-żmien speċifikat fil-kuntratt t'impieg preċitat***".

16. From the above it is evident that the plaintiff was contesting the dismissal in its substance. He contends that what he did does not tantamount to gross misconduct. On the other hand the defendat claimed that the dismissal was for a good and sufficient cause. Such a matter cannot be decided by limiting oneself to the procedural fairness on the way the employee was dismissed.

17. Furthermore, the court refers to that part of the decision entitled *'osservazzjonijiet tat-Tribunal'*, and comments:

    i. The Tribunal did not explain the relevance of the first three paragraphs with regards to the merits of the case under review.

ii. The Tribunal said that the applicant was given a choice, either to resign or be dismissed. Reference was also made to forced resignations. However, applicant did not resign. His employment was terminated by the employer.

18. Since the court will be revoking the Tribunal's decision for the above mentioned reasons, it is not necessary to deal with defendant company's other complaints other complaints.

For these reasons the Court upholds the appellant's second complaint and revokes the decision of the Industrial Tribunal delivered 25th May, 2018.

The Registrar is to forward the relative file back to the Industrial Tribunal in order to consider and decide on all evidence produced by both parties and ultimately decide whether under the circumstances the employer had a good and sufficient cause to dismiss the plaintiff.

Each party is to pay its respective judicial costs.

Anthony Ellul.